IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 338 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

NAVAL INDUSTRIES & Ors.: Appellants.

Versus

ABDULVAHEB MAHMADHUSSAIN : Respondent.

Appearance:

MR SURESH M SHAH for the Appellants.

MR AJ PATEL for the Respondent.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 08/04/97

ORAL JUDGEMENT

This appeal is directed against the judgment and decree dated 30th November 1978, passed by the then learned Judge of the City Civil Court at Ahmedabad, in Civil Suit No. 282 of 1975, whereby the appellants are ordered to pay Rs.7,268.45 ps. together with interest thereon at the rate of 6% p.a. and costs to the respondent.

2. The facts in brief leading the present appellants

to prefer the appeal may be stated. The respondent-original plaintiff carries on business in the name & style "Kamal Industries". He manufactures spare-parts, machinery etc. The appellant No.1 is the partnership firm and appellants No. 2 to 4 are the partners thereof. They carry on the business of sale and purchase of mill machinery, spare-parts and other equipments for and on behalf of the textile mills. Mewad Textile Mills at Bhilwada was in need of certain machineries. After negotiations the appellants placed the orders with the present respondent on 4th July 1970. As per the orders, the respondent had to supply likerin undercasing machine and 19 ring frame pneumafil machines. The likerin undercasing machine was to be supplied for Rs. 118.45 ps. while ring frame pneumafil machines were to be supplied at the rate of Rs.1,700/per machine. The order for ring frame pneumafil machine was placed on 27th May 1970. It was agreed that initially the respondent would install one machine in the Mewad Textile Mills, and on approval from the mill authority, other machines were to be supplied. As per the order received from the appellants, the respondent effected the delivery of one machine and erected the same in the mill premises at Bhilwada. After the receipt of the approval from the mill authority, six other machines were delivered on 13th January 1971. The appellants were in hurry to have 10 more machines, and therefore four other machines kept ready on hand, but without pipes and gutters, were also delivered. Shortly thereafter six other machines were supplied on 2nd February 1971. To effect the delivery at the earliest, for which the appellants were pressing much, the respondent had to purchase raw materials to the tune of Rs.4,800/- and manufacture the parts of the machine. The respondent had to bear the packing expenses to the tune of Rs.430/-. Initially, as per the agreement 50% of the amount were to be paid and the remaining 50% of the amount were to be paid immediately after the approval report. Though the respondent performed his part of contract by making delivery as per the agreement and though approval report was obtained, the appellants did not make the payment for a pretty long time. They had paid only Rs. 10,000/- in 1970 and Rs. 1,000/- in February 1971. The value of seven complete machines came to Rs.11,900/- but the appellants paid 50% thereof. The respondent then demanded the amounts not paid by the appellants but the appellants despite repeated demands avoided to make the payment. With no option therefore the respondent was constrained to issue a notice of demand on 16th March 1971. Even after being served with the notice, no payment was made. On the contrary, the appellants came out with a strange case submitting that

respondent had not given the goods as contracted for. Whatever delivery was effected it was incomplete and the likerin undercasing machine was defective, as a result it was rejected. Seven complete machines were not delivered at all. Six machines directly delivered to the mill were useless and two machines were not properly functioning. The appellants therefore claimed Rs. 2,070/- back. It was also brought to the notice of the respondent that he was not entitled to claim Rs.4,800/-, the value of the raw materials he purchased. In short, finding fault with the respondent, appellants avoided to make payment. With no option therefore the respondent was constrained to file the suit before the lower court to recover Rs. 118.45 ps. the value of likerin undercasing machine, Rs.5,020/- the value of four machines, Rs.11,900/- the value of seven complete machines, Rs.430/- the packing charges, and Rs.4,800/- the value of raw materials and utilised for making spare-parts; in all Rs. 22,268.45 ps. less Rs.11,000/- already received, i.e. Rs. 11,268.45 ps. together with Rs.2,031.55 ps. by way of interest from 20th September 1971, and Rs.30/- notice charges, totalling to Rs.13,330/-.

3. The appellants filed their written statement obtaining leave to defend. They in short found fault with the respondent submitting that full delivery was not effected and whatever in numbers the machines were delivered, were defective and not functioning well etc. They also contended that they weere entitled to have the refund rather than liable to make payment as prayed for.

4. The learned Judge below framed necessary issues and considering the materials on record found that the respondent was not entitled to damages for the raw materials, but was entitled to Rs.7,268.45 ps. together with interest from the date of the suit, and not upto the date of the suit. The contentions raised on behalf of the appellants were negatived. Being aggrieved by such judgment and decree, the appellants have preferred this appeal.

5. It is the admitted fact that the respondent delivered in all 11 machines to the appellants. One machine was completed and the same was installed in the mill. Thereafter 10 machines were delivered, of them four were not complete because the gutter pipe to be attached was not provided. Thus in all 11 machines were delivered though the contract was for 19 machines. The order was placed on 17th May 1970 vide, Exh. 56 and the same was accepted on 28th May 1970 vide Exh. 62. The contents of Exh. 56 & 62 therefore constitute the

contract. As per that contract, initially 50% of the amounts were to be paid to the respondent and rest of the amounts were to be paid within two months after the delivery of the machines. So far as delivery of likerin undercasing machine is concerned, there is no dispute before me. The value of that machine is Rs. 118.45 ps. I will not, therefore, be dealing with the delivery of that machine and rival claims in that regard as the same are now set at rest because of no dispute about the delivery thereof.

6. It has been contended on behalf of the appellants that other 10 machines were not delivered. The contention carries no weight. The memos prepared at the time of delivery on 23rd January 1971 are produced at Exh.49 & 59 and that show that the machines were delivered by a truck to the mills. Thereafter, two bills were sent, one dated 2nd February 1971 produced at Exh.44 and another dated 6th February 1971 produced at Exh.45. At no point of time, the appellants raised any objection against these bills and their silence is rightly held to be the admission about the delivery of the machines having been effected. It may be stated that when the respondent found that the appellants were eschewing the payment finding out one or the another fault, the notice produced at Exh. 50 was issued calling upon the appellant to make the payment failing which it was made clear that the suit would be filed for the recovery thereof. It appears that, after the receipt of the notice, reply thereof was not given. No doubt, the appellants have submitted that they replied the notice making their stand clear, but the copy of the reply if at all given is not produced, and no reason is assigned for omission to produce the copy of the reply. If the party is in possession of the document and fails to produce the same though it is relevant for deciding the issues that arise for consideration, it is open to the court to infer every thing against that party. The learned Judge was, therefore,perfectly right on such fact that the case of the appellant was ill-based and they were cavilling unnecessarily. It may be mentioned that another notice vide Exh. 51 was given to the appellants wherein the respondent also made a reference about the first notice and no reply is given by the appellants. From these facts, it appears that notices, Exh. 50 & 51 are not replied at all, and shrewdly the appellants remained silent. When they have not replied to the notices, it amounts to admission of the claim by conduct. Whatever they have then asserted and put forth after being served summons in the suit, should be held to have been made out suitably by necessary alterations and additions.

7. On 23rd January 1971 vide Delivery Memos, Exh. 49 & 59, the delivery of 10 machines were effected in the mill premises situated at Bhilwada. The case of the appellants that they rejected the machines sent the same back and received the acknowledgment from the respondent cannot be accepted, because according to them the acknowledgment was of the same date. When the respondent was not in Delhi but was at Ahmedabad on 23rd January 1971 there was no possibility of his acknowledging the receipt of the machine back as alleged by the appellants. The contention therefore that the machines which were not as per the specification were returned and accordingly the delivery was not effected, cannot be sustained.

8. It was next contended on behalf of the appellants that when the machines were found defective the same were returned back and the appellants were compelled to purchase the machines from the market at the higher price, i.e. at the rate of Rs. 1,925/- per machine and thereby the appellants were compelled to spend Rs. 1,800/- more for 8 machines which the respondent is bound to pay to them. In that regard, the letters Exh. 66 and 67 are relied upon, but the learned Judge has rightly held that both the letters are got up subsequently so as to screen themselves from the liability. In the letter Exh. 66, the appellants did not mention anything about the four machines alleged to have been delivered without gutter pipes, and they have come out with a case that only 5 machines were not in working condition and therefore the same were returned. It may be mentioned at this stage that appellants have come out with a case that all the 10 machines were returned, and in the letter Exh. 66, their case is about the return of 5 machines. Thereafter, in the letter Exh.67 there is no reference about the gutter pipe and the amounts they spent more for purchasing the machines from else where in the market. Even they have not produced any document going to show that in fact they purchased other machines from the market at the higher price as the respondent did not perform his part of contract within specified time and also as per specification. What can therefore be deduced is that to get out from the liability, the appellants have at different stages come out with conflicting versions and that discredits their bonafides.

9. One more point was also pressed before me. According to the appellants' learned advocate the appellants had given electric motor on 22nd August 1970 to the respondent for testing the machine and the challan thereof was got signed which is at Exh. 68. That

testing machine was not returned by the respondent and therefore the value thereof was required to be adjusted, but the learned Judge turning down their contention did not adjust the amount of the electric motor. It seems, the appellants act like a drowning man catching anything available and baffle the respondent. It is made clear by the respondent in his evidence that he is having 5 electric motors for testing the machine and his case is rightly accepted because the person who manufacturers the machine would always keep the testing machine and quality control equipments so that he can deliver the goods to the customer as per the contract and specification and may not have to retreat in the market, and thereby invite injury to his goodwill acquired after toiling for considerable time in past. Further Exh. 68 which is the challen produced in support of the case about electric motor seems to have been got up subsequently. The challen is signed by Abdul Samat and not by the respondent. When being trapped the appellants came out with a case that Abdul Samat was the respondent's son and while effecting delivery of the electric motor respondent's son signed the same. But their such tricky case made out for the purpose of eschewing the liability is exposed. The respondent has made it clear that he is having only one son named, Abdul Kadar and not Abdul Samat. This shows that by preparing the challan, Exh. 68 some one was made to sign as Abdul Samat so as to have support of the case which was subsequently engineered for avoiding the liability to pay for the goods purchased.

10. For effecting the delivery of the machines before the time fixed as the appellants were making haste, the respondent had to purchase some materials to the tune of Rs. 4,800/- from the market. Such case is not assailed while cross-examining the respondent. The learned Judge, therefore, rightly accepted the case. The contention that the learned Judge, without any evidence, believed the respondent, therefore, gains no ground to stand upon.

11. On no other point, the judgment and decree passed by the lower court are assailed. I am in general agreement with the reasonings and findings of the learned Judge below. He has rightly taking pains discussed the evidence with meticulous care and finicky details, and I see no justification to interfere with his findings and the decree passed. For the aforesaid reasons, the appeal

being devoid of merits is dismissed with no order as to costs. Decree be drawn accordingly.

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